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7 **UNITED STATES DISTRICT COURT**

8 **NORTHERN DISTRICT OF CALIFORNIA**

9 **SAN FRANCISCO DIVISION**

10 BRIAN H. ROBB, Individually and on Behalf  
11 of All Others Similarly Situated,

12 Plaintiff,

13 v.

14 FITBIT, INC., JAMES PARK, and WILLIAM  
15 R. ZERELLA,

16 Defendants.

17 Case No. 3:16-cv-00151-SI

18 **INSTITUTIONAL INVESTOR  
GROUP'S MEMORANDUM OF LAW  
IN OPPOSITION TO COMPETING  
MOTIONS FOR APPOINTMENT OF  
LEAD PLAINTIFF AND LEAD  
COUNSEL**

19 Date: April 15, 2016

Time: 2:30 p.m.

Courtroom: 1, 17th Floor

Judge: Hon. Susan Illston

20 ORAL ARGUMENT REQUESTED

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## **INTRODUCTION**

Lead Plaintiff movants and putative Class members, City of Omaha Police and Fire Retirement System (“Omaha”), Local No. 8 IBEW Retirement Plan & Trust (“IBEW Local No. 8”), and Chester County Employees Retirement Fund (“Chester County”) (collectively, the “Institutional Investor Group”), respectfully submit this memorandum of law in opposition to the competing motions for appointment of Lead Plaintiff and Lead Counsel filed by: George Diaz (“Diaz”) (*See* ECF No. 11); Timothy Flynn, Jesse M. Koth and Kelley Koth, Viet Tran, and Mark Cunningham (collectively, the “Fitbit Investor Group”) (*See* ECF No. 14); Bright Agyapong (“Agyapong”) (*See* ECF No. 18); and the Teamsters Local 282 Trust Funds (“Teamsters 282”) (*See* ECF No. 22).

Presently, there are five competing motions for appointment of Lead Plaintiff in the securities class action against Fitbit Inc., James Park, and William R. Zerrella before this Court. These motions are governed by the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4, *et seq.*, which direct that the movant with the largest financial interest in the case shall be deemed the “presump[tive]” lead plaintiff and shall be appointed, as long as it is otherwise typical and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure. *In re Versata, Inc. Sec. Litig.*, No. C 01-1439 SI, 2001 WL 34012374, at \*2 (N.D. Cal. Aug. 20, 2001). Here, a review of the competing lead plaintiff motions demonstrates that the Institutional Investor Group, which is comprised of three public pension funds who have provided declarations about their commitment and plan to actively oversee this litigation, is the very sort of lead plaintiff that the PSLRA encourages to participate in private securities class actions. The Institutional Investor Group not only asserts the largest financial loss, it is otherwise typical and adequate. As such, the Institutional Investor Group should be appointed Lead Plaintiff under the analysis required by the PSLRA. *See In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002).

The Institutional Investor Group has a loss of approximately \$2.03 million. Only one movant, the Fitbit Investor Group, claims a higher loss, asserting approximately \$3.17 million in losses. However, a review of the Fitbit Investor Group's papers reveals that its loss figures are infirm for a number of reasons and should be set aside. Specifically, the Fitbit Investor Group's

1 aggregation of its losses is improper because it has failed to meet the criteria for appointing a group,  
 2 as set forth under this Court’s decision in *Versata*. Despite the evidence required by *Versata*, the  
 3 Fitbit Investor Group provided ***no evidence*** to “demonstrate[]” that it can adequately represent the  
 4 Class consistent with the PSLRA. *Versata*, 2001 WL 34012374, at \*5-7 (discussing evidence to be  
 5 considered in evaluating whether aggregation is appropriate). Specifically, unlike the Institutional  
 6 Investor Group, the Fitbit Investor Group has submitted ***no evidence*** concerning the respective  
 7 backgrounds of its five individual members, ***no evidence*** that its members had any communications  
 8 prior to moving for lead plaintiff, and ***no explanation*** as to how its members can cohesively manage  
 9 the litigation. For this reason, there is no basis to conclude that appointment of the Fitbit Investor  
 10 Group would be consistent with the PSLRA. *See id.* Thus, the Fitbit Investor Group and its losses  
 11 cannot be considered collectively.

12 In addition to being entirely unsupported by the record, the Fitbit Investor Group’s attempt at  
 13 aggregation fails because its papers affirmatively show that two of its members, Viet Tran (“Tran”)  
 14 and Mark Cunningham (“Cunningham”), cannot serve as part of the Fitbit Investor Group. Tran’s  
 15 certification reflects that he is not represented by the Fitbit Investor Group’s proposed co-lead  
 16 counsel in this case, Glancy Prongay & Murray LLP (“Glancy”) and Pomerantz LLP (“Pomerantz”),  
 17 but, instead, by a third law firm that appears nowhere else in the Fitbit Investor Group’s papers, the  
 18 Rosen Law Firm, P.A. (“Rosen”). *See* ECF No. 15-2 at 8. In light of his separate representation,  
 19 Tran’s inclusion would add a separate, potentially disparate, voice to the leadership of this action  
 20 and raises serious questions as to which law firms, the two firms proposed as co-lead counsel by the  
 21 Fitbit Investor Group or Tran’s separate counsel, are making decisions on behalf of the putative  
 22 Class.

23 Cunningham is also not an appropriate member of the Fitbit Investor Group because, as  
 24 shown by his certification, he is an “in and out” trader who is potentially subject to a unique defense  
 25 as to whether he relied on the public price of Fitbit stock when making his trades. Between  
 26 September 15, 2015 and January 6, 2016, Cunningham purchased Fitbit stock 114 times and sold  
 27 Fitbit stock 68 times, with purchases and sales of large chunks of stock often occurring on the same

1 day in wash transactions. *See* ECF No. 15-2 at 12-16. In sum, Cunningham bought \$5,766,909  
 2 worth of Fitbit stock and then sold \$5,218,247, with all but one sale occurring prior to the first  
 3 disclosure of the truth alleged in this case. *See* ECF No 15-3 at 2-5. The “loss” Cunningham asserts  
 4 in this case is associated with the residual shares accumulated by Cunningham in pursuit of whatever  
 5 trading strategy he was employing. These types of highly atypical traders are not appropriately  
 6 appointed lead plaintiff. *See, e.g., Eichenholtz v. Verifone Holdings, Inc.*, No. C 07-0614 MHP,  
 7 2008 WL 3925289, at \*11 (N.D. Cal. Aug. 22, 2008).

8 Finally, approximately \$750,000 of the Fitbit Investor Group’s losses should not be counted  
 9 in connection with assessment of “financial interest” because they are associated with the sale of  
 10 stock prior to the alleged disclosure of the truth on January 6, 2016. As this Court has recognized,  
 11 “[a] shareholder who sells stocks before a disclosure of truthful information will not have suffered  
 12 any loss based on a misrepresentation related to that information.” *In re Connectics Corp. Sec.*  
 13 *Litig.*, 542 F. Supp. 2d 996, 1003 (N.D. Cal. 2008) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S.  
 14 336, 342 (2005)). For this reason, courts regularly discount such losses when calculating financial  
 15 interest, which is the appropriate course here.

16 Accordingly, the Institutional Investor Group has the largest loss of any movant, as reflected  
 17 in the chart below:

| <b>Movant Losses with Dura Adjustments<sup>1</sup></b> |                        |
|--|------------------------|
| <b>Movant</b>  | <b>Losses</b>          |
| Institutional Investor Group                           | \$2,034,261            |
| Teamsters 282  | \$961,185 <sup>2</sup> |
| Jesse M. Koth and Kelley Koth                          | \$791,119              |
| Timothy Flynn  | \$693,135              |
| Mark Cunningham  | \$548,663              |
| Viet Tran  | \$392,172              |
| George Diaz  | \$236,558              |
| Bright Agyapong  | \$144,851              |

24 <sup>1</sup> Given the small size of their losses, we did not perform a *Dura* analysis for movants  
 25 Agyapong and Diaz. In addition, Teamsters 282 did not have any sales during the relevant period.  
 26 *See* Declaration of Thomas L. Laughlin (“Laughlin Decl.”), Ex. A.

27 <sup>2</sup> Teamsters 282’s loss chart includes a purchase on January 5, 2016 of 5,260 shares at  
 28 \$29.95, a purchase that is not reflected in its original or amended certification. *Compare* ECF No.  
 32-1 with ECF No. 23-3. The \$961,185 loss set forth in this chart reflects Teamsters 282 loss  
 without this additional purchase, rather than the loss of \$1,036,145 claimed in Teamsters 282’s loss  
 chart.

1 For the foregoing reasons, and the reasons stated in the Institutional Investor Group's lead  
 2 plaintiff motion, the motions by the competing lead plaintiffs should be denied.

3 **BACKGROUND**

4 This securities class action, which commenced on January 11, 2016, alleges claims on behalf  
 5 of persons who purchased Fitbit securities: (1) pursuant and/or traceable to Fitbit's false and  
 6 misleading Registration Statement and Prospectus issued in connection with the Company's initial  
 7 public offering on or about June 18, 2015 (the "IPO" or the "Offering"); and/or (2) on the open  
 8 market between June 18, 2015 and January 6, 2016. The action asserts claims under both the  
 9 Securities Act of 1933 (the "Securities Act"), with respect to the misleading Registration Statement  
 10 and Prospectus, and under the Securities Exchange Act of 1934 (the "Exchange Act"), with respect  
 11 to Defendants' other misstatements. ¶2.<sup>3</sup>

12 Fitbit manufactures and provides wearable fitness-tracking devices worldwide. The  
 13 Company's main products are wrist bands and clippable devices that purport to monitor a user's  
 14 fitness activity by tracking his/her health and fitness activities. Among the Company's products are  
 15 Fitbit Charge HR ("Charge HR"), a wireless heart rate and activity wristband, and Fitbit Surge  
 16 ("Surge"), a fitness watch that consists of a GPS watch, heart rate tracker, activity tracker, and  
 17 smartwatch. On or about June 18, 2015, Fitbit completed its IPO, issuing 36,575,000 shares and  
 18 raising net proceeds of approximately \$732 million. ¶5.

19 The Complaint alleges that Fitbit and the individually-named Defendants made false and/or  
 20 misleading statements and/or failed to disclose that: (1) Fitbit's heart rate monitoring technology  
 21 was inaccurate and did not consistently deliver accurate heart rate readings during exercise; (2) the  
 22 inaccuracy of Fitbit's heart rate monitoring technology posed serious health risks to users of Fitbit's  
 23 products; and (3) as a result of the foregoing, Fitbit's public statements were materially false and  
 24 misleading at all relevant times. ¶6.

25 The Complaint further alleges that true facts underlying these statements began to be  
 26 revealed on January 6, 2016, when a class action lawsuit was filed against Fitbit in the United States

27 <sup>3</sup> Unless otherwise noted, all references to "¶" and "¶¶" are to the Class Action Complaint,  
 28 filed on January 11, 2016, ECF No. 1.

1 District Court for the Northern District of California, alleging that the heart rate monitoring systems  
 2 on the Company's Charge HR and Surge devices were dangerously inaccurate and posed serious  
 3 health risks to users. On this news, Fitbit's stock fell \$1.40 per share, or 5.8%, to close at \$22.90 per  
 4 share on January 6, 2016. ¶¶39-42.

5 **ARGUMENT**

6 **I. The Standard for Selecting Lead Plaintiff Under the PSLRA**

7 The lead plaintiff appointment process under the PSLRA was enacted to preserve the important enforcement function of private securities class actions, while simultaneously bringing to  
 8 an end "lawyer-initiated and -driven litigation." *Versata*, 2001 WL 34012374, at \*2. To accomplish  
 9 this goal, the PSLRA created a rebuttable presumption that the movant with the "largest financial  
 10 interest in the relief sought by the class" should be appointed lead plaintiff. 15 U.S.C. §78u-  
 11 4(a)(3)(B)(iii)(I)(bb); *see also Richardson v. TVIA, Inc.*, No. C 06 06304 RMW, 2007 WL 1129344,  
 12 at \*2 (N.D. Cal. Apr. 16, 2007) (discussing the PSLRA's lead plaintiff appointment process); and  
 13 *Versata*, 2001 WL 34012374, at \*2. The lead plaintiff presumption can be rebutted by competing  
 14 movants if they come forward with "evidence" that the presumptive plaintiff is not adequate and  
 15 typical within the meaning of Fed. R. Civ. P. 23. *Id.*; and *see also Cavanaugh*, 306 F.3d at 729  
 16 ("The Reform Act provides a simple three-step process for identifying the lead plaintiff.").

17 Applying this law, the Institutional Investor Group is the presumptively most adequate  
 18 Plaintiff and should be appointed as Lead Plaintiff for the Class.

19 **II. The Fitbit Investor Group's Aggregation Fails Under *Versata* and Is Improper**

20 The Fitbit Investor Group claims a loss of \$3.17 million, facially larger than the \$2.03  
 21 million loss claimed by the Institutional Investor Group. *See* ECF No. 14 at 6. However, the Fitbit  
 22 Investor Group cannot be aggregated because it fails to meet the criteria set forth by this Court in  
 23 *Versata*. *See Versata*, 2001 WL 34012374, at \*2. In fact, the Fitbit Investor Group is an  
 24 agglomeration of five, unrelated, individual investors with two proposed co-lead counsel, a third  
 25 undisclosed counsel, and absolutely no evidence that it can cohesively, effectively, and actively lead  
 26

1 this litigation. Accordingly, the losses of the individual members of the Fitbit Investor Group should  
2 not be aggregated for purposes of the PSLRA.

**A. The Fitbit Investor Group Has Offered No Evidence Demonstrating that Its Aggregation Is Appropriate Under *Versata* or the PSLRA**

5        In *Versata*, the Court addressed the appropriateness of aggregation under the PSLRA,  
6 holding that it would evaluate such proposed groups on a ““case-by-case inquiry,”” guided by ““a  
7 rule of reason”” with a focus on whether ““the proposed group ‘will actively represent the class.’”” *Id.*  
8 at \*5. While the Court observed that there was ““no set criteria to assess,”” it observed that courts  
9 following ““a rule of reason”” approach have ““required specific information from proposed lead  
10 plaintiffs,”” including: (i) ““descriptions of [the group’s] members, including any pre-existing  
11 relationship among them;” (ii) ““an explanation of how its members would function collectively;”  
12 and (iii) ““a description of the mechanism that its members and the proposed lead counsel have  
13 established to communicate with one another about the litigation.”” *Id.*; and *see also id.* at \*6-7  
14 (running through extensive evidence submitted by proposed members of a group and allowing  
15 aggregation, based on an evaluation of the evidence).<sup>4</sup>

16 Thus, movant groups seeking appointment as lead plaintiff have specific guidance from this  
17 Court, as to the evidence required by this Court before a group's motion will be considered. Despite  
18 this guidance from the Court, the Fitbit Investor Group seeks to aggregate the losses of its five

<sup>4</sup> Consistent with this Court’s reasoning in *Versata*, other courts following “a rule of reason” approach to aggregation have similarly emphasized the need for members of such a group to support their motion with evidence concerning their coherence and ability to manage the litigation. See, e.g., *Peters v. Jinkosolar Holdings, Co., Ltd.*, No. 11 Civ. 7133 (JPO), 2012 WL 946875, at \*6 (S.D.N.Y. Mar. 19, 2012) (“Courts have expressed particular concern when potential lead plaintiff groups appear to have been ‘cobbled together’ for the sake of the litigation.”); *Elstein v. Net1 UEPS Techs., Inc.*, No. 13 Civ. 9100 (ER), 2014 WL 3687277, at \*3 (S.D.N.Y. July 23, 2014) (“this court has required that unrelated plaintiffs first demonstrate that appointment as a group would best serve the class”). To carry their burden, investors seeking to aggregate their losses must come forward with evidence showing that the “group will be able to function cohesively” and “effectively manage the litigation apart from their lawyers.” *Khunt v. Alibaba Grp. Holding Ltd.*, No. 15 Civ. 00759 (CM), 2015 WL 1954134, at \*7 (S.D.N.Y. May 1, 2015) (quoting *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008)). Factors courts have looked to in evaluating this issue include: “(1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for cooperation; (4) the sophistication of its members; and (5) whether the members chose outside counsel, and not vice versa.” *Id.*

1 constituent members, but it has entirely failed to comply with the *Versata* criteria. *See Versata*,  
 2 2001 WL 34012374, at \*5. Considering the evidence of their ability to direct this litigation, the  
 3 Fitbit Investor Group falls short in every respect. The Fitbit Investor Group has submitted no  
 4 evidence concerning the backgrounds of its members or their relationship with one another, if any.  
 5 *See* ECF No. 14. Similarly, the Fitbit Investor Group has provided no evidence that it has a plan to  
 6 function cohesively or that its members will communicate effectively with one another. *See id.*  
 7 There is no description of the facts surrounding the formation of the Fitbit Investor Group and no  
 8 explanation of how the Fitbit Investor Group's three sets of lawyers plan to coordinate with one  
 9 another. *Id.* While the members of the Fitbit Investor Group have submitted certifications, these  
 10 certifications contemplate each member individually serving as a "representative party" and make no  
 11 mention of working together as a group. The complete absence of such evidence strongly suggests  
 12 that the Fitbit Investor Group is nothing more than a lawyer-driven group of individual investors that  
 13 lacks the resources and sophistication to effectively prosecute this action.<sup>5</sup>

14 **B. The Fitbit Investor Group's Papers Affirmatively Show that Aggregation Is  
 15 Inappropriate Under *Versata* and the PSLRA**

16 The Fitbit Investor Group's own lead plaintiff papers show why aggregation is not  
 17 appropriate here. Most notably, the Fitbit Investor Group includes Tran, who is an individual  
 18 represented by entirely different counsel than that proposed as co-lead counsel. Tran's certification  
 19 reflects that his counsel is Rosen, not proposed co-lead counsel Glancy or Pomerantz. *Compare*  
 20

---

21 <sup>5</sup> The shortcomings of the Fitbit Investor Group's evidence stand in stark contrast to the  
 22 evidence submitted by the Institutional Investor Group in support of its motion. The Institutional  
 23 Investor Group submitted a joint declaration that provided background on each of its members,  
 24 including each members' experience with securities litigation and financial sophistication. *See* ECF  
 25 No. 27-6 at 3-5, ¶¶1-8. The Institutional Investor Group also submitted evidence concerning its  
 26 members' decision to work together and its members' pre-motion discussions with one another  
 27 regarding coordination and procedures for future communication. *See id.* at 5-7, ¶¶9-15. Further,  
 28 unlike the Fitbit Investor Group, the Institutional Investor Group seeks to appoint a single firm as  
 lead counsel, providing for a more consolidated legal leadership of the case. *See id.* at 7, ¶16. The  
 Institutional Investor Group's coherence is further supported by the fact that all of its members are  
 institutions, the preferred type of lead plaintiff under the PSLRA. *See Perlmutter v. Intuitive  
 Surgical, Inc.*, No. 10-CV-03451-LHK, 2011 WL 566814, at \*13 (N.D. Cal. Feb. 15, 2011)  
 (appointing "an institutional investor . . . comports with the PSLRA's goal to increase the  
 likelihood that institutional investors would serve as lead plaintiffs"); *Feyko v. Yuhe Int'l Inc.*, No.  
 CV 11-05511 DDP (PJWx), 2012 WL 682882, at \*3 (C.D. Cal. Mar. 2, 2012).

1 ECF No. 14 at 10 *with* ECF No. 15-2 at 8. Rosen is not mentioned in either the Fitbit Investor  
 2 Group's lead plaintiff motion or the proposed lead plaintiff order it submitted. *See* ECF Nos. 14, 14-  
 3 1. Nothing is distinguished about what Rosen's role would be, should the Fitbit Investor Group be  
 4 appointed. The presence of a third law firm, with an undisclosed role, is direct evidence that the  
 5 Fitbit Investor Group cannot direct this case without "undue influence" by counsel and that the Fitbit  
 6 Investor Group was created by, and for the benefit of, its attorneys, not the putative Class. *See*  
 7 *Versata*, 2001 WL 34012374, \*6.

8 **C. Cunningham Is Not an Appropriate Lead Plaintiff Because of His Unique Trading  
 9 Strategy**

10 Cunningham is also not an appropriate member of the Fitbit Investor Group because, as  
 11 shown by his certification, he was an "in and out" trader who is potentially subject to a unique  
 12 defense pertaining to whether he relied on the public price of Fitbit stock when making his trades.  
 13 Between September 15, 2015 and January 6, 2016, Cunningham purchased Fitbit stock 108 times  
 14 and sold Fitbit stock 68 times, with purchases and sales of large chunks of stock often occurring on  
 15 the same day in wash transactions. *See* ECF No. 15-2 at 12-16. For example, on November 9, 2015,  
 16 Cunningham purchased two lots of 500 shares of Fitbit stock and two lots of 250 shares. *See id.* at  
 17 12. On the same day, he sold 100 shares of Fitbit twice, 103 shares once, and 197 shares once. *See*  
 18 *id.* at 15. Over the course of the next few days in November, Cunningham purchased and sold tens  
 19 of thousands of shares of Fitbit in dozens of trades. *See id.* In sum, Cunningham purchased  
 20 \$5,766,909 worth of Fitbit stock and then sold \$5,218,247 worth of Fitbit stock, with all but one sale  
 21 occurring prior to the first disclosure of the truth alleged in this case. *See* ECF No. 15-3 at 2-5. As  
 22 such, the "loss" Cunningham asserts in this case is simply associated with the residual shares he  
 23 accumulated in pursuit of whatever trading strategy he was employing.

24 Courts have routinely held that highly atypical traders, such as Cunningham, are not  
 25 appropriately appointed lead plaintiff. *See, e.g.*, *Eichenholtz*, 2008 WL 3925289, at \*11 ("This day-  
 26 trader would not be typical of the class because the class's damages stem from reliance upon the  
 27 company's financial statements, not upon daily market volatility. Specifically, it may be subject to a

1 unique defense regarding its reliance upon publicly available information.”) (citing *In re Silicon*  
 2 *Storage Tech. Sec. Litig.*, No. C 05-0295 PJH, 2005 U.S. Dist. Lexis 45246, at \*25 (N.D. Cal. May  
 3 2005); *In re Bally Total Fitness Sec. Litig.*, No. 04C3530, 2005 WL 627960 (N.D. Ill. Mar. 15,  
 4 2005)).

5 **III. The Fitbit Investor Group’s Non-*Dura* Losses Should Be Excluded**

6 Approximately \$750,000 of the Fitbit Investor Group’s losses should not be counted in  
 7 connection with assessment of “financial interest” because they are associated with the sale of stock  
 8 prior to the alleged disclosure of the truth on January 6, 2016. ¶¶39-42. Specifically, \$326,396 of  
 9 the losses claimed by Tran and \$424,538 of the losses claimed by Flynn relate to Fitbit shares sold  
 10 by these two investors prior to the disclosure of the truth on January 6, 2016. *See* ECF No. 15-2 at  
 11 2-3, 7-9; and ECF No. 15-3. These losses are not recoverable because they were not caused by  
 12 Defendants’ fraud. *See Connectics*, 542 F. Supp. 2d at 1003. Accordingly, courts regularly exclude  
 13 such losses when calculating movants’ respective losses and such an approach is warranted here.  
 14 *See Eichenholtz*, 2008 WL 3925289, at \*3 (“[I]t is clear that under *Dura* and its progeny, any losses  
 15 that [a plaintiff] may have incurred before [defendant’s] misconduct was ever disclosed to the public  
 16 are not recoverable, because those losses cannot be proximately linked to the misconduct at issue in  
 17 this litigation.”) (citing *In re Converse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG)(RER), 2007  
 18 WL 680779, at \*4 (E.D.N.Y. Mar. 2, 2007)); *Mulligan v. Impax Labs., Inc.*, No. C-13-1037 EMC,  
 19 2013 WL 3354420, at \*5 (N.D. Cal. July 2, 2013) (“Where a plaintiff sustained losses during a class  
 20 period, but these losses stem from stocks sold before the alleged fraud was revealed, these losses  
 21 would generally not be traceable to the fraud, but instead to ordinary market forces.”).

22 **IV. Applying the Foregoing Arguments, the Institutional Investor Group Has the Largest  
 23 Loss**

24 As the discussion above shows, the Institutional Investor Group has the largest financial  
 25 interest in this case. The losses of the movants, with the losses of the Fitbit Investor Group  
 26 disaggregated and adjusted for *Dura*, are set forth below:

| <b>Movant Losses with Dura Adjustments</b> |               |
|--|---------------|
| <b>Movant</b>                              | <b>Losses</b> |
| Institutional Investor Group               | \$2,034,261   |
| Teamsters 282                              | \$961,185     |
| Jesse M. Koth and Kelley Koth              | \$791,119     |
| Timothy Flynn                              | \$693,135     |
| Mark Cunningham                            | \$548,663     |
| Viet Tran                                  | \$392,172     |
| George Diaz                                | \$236,558     |
| Bright Agyapong                            | \$144,851     |

With a loss of \$2.03 million, the Institutional Investor Group has a loss that is more than twice the size of the next nearest movant, Teamsters 282. The Institutional Investor Group's loss of \$2.03 million is also larger than the \$1,484,254 in combined losses of the Fitbit Investor Group, when Cunningham and Tran are excluded due to their individual inadequacies. *See Laughlin Decl.*, Ex. A.

### **CONCLUSION**

For the foregoing reasons, the Institutional Investor Group respectfully requests that the Court deny the competing motions for appointment of Lead Plaintiff, appoint Institutional Investor Group as Lead Plaintiff in this action, and approve its selection of the law firms of Scott+Scott, Attorneys at Law, LLP, to serve as Lead Counsel, and Kessler Topaz Meltzer & Check, LLP, to serve as Liaison Counsel.

Dated: March 25, 2016

Respectfully submitted,

**KESSLER TOPAZ MELTZER  
& CHECK, LLP**

*s/Jennifer L. Joost*

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2016.

## **KESSLER TOPAZ MELTZER & CHECK, LLP**

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## Mailing Information for a Case 3:16-cv-00151-SI Robb v. Fitbit Inc. et al

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